

The Derivation of the American Jury from the English Jury of Henry II

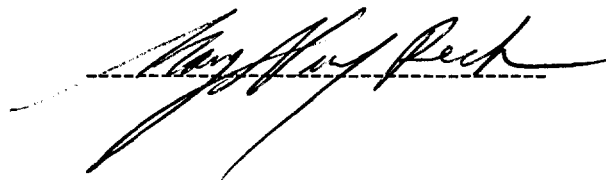
An Honors Thesis (Honors 499)

by

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Ball State University

Muncie, Indiana

Date: April 1997

Expected Graduation: May 1997

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Focus of Thesis

The focus of this thesis is the derivation of the American jury system from the English jury of Henry II. To this end, a short history of English law and the history of the development of the English jury is given. The method of the English jury's development is used to show the evolution of the early American jury into the American jury of today.

The American jury still resembles the English jury from which it evolved. The American system has a grand jury to indict criminals and a petit jury to try the case. The practice of taking an oath was begun by the English jurors and is still in practice in American today as well as the challenging of potential jurors for bias. The American system differs from the juries of old in its inability to determine matters of law and in its move away from unanimity in verdicts and the twelve-man jury.

Some of the aspects of the historical English jury are still in use in the American jury system of today, but some differences have been created through case law and legislation. It will come to no surprise, however, that the most important characteristics of the historical English jury are still present in the American system today.

The American jury system has been under attack by the public in the last several years because of the unpopular verdicts handed down in cases such as the Rodney King beating by several Los Angeles police officers and the acquittal of O.J. Simpson, who was charged with murdering his ex-wife and her boyfriend. These decisions, and others, have caused people to question whether the jury system still works and what reforms could possibly be made to improve it. Even with all of the negative reactions to jury verdicts and calls for reform, chances are very good that any critic of the system faced with criminal prosecution himself would not be lax to thank the English for this wondrous phenomenon called trial by jury. It is this topic that will be addressed in this paper--how the present-day American jury system derived from the English jury, focusing specifically on the areas of impartiality, fact-finding, and unanimity in verdicts.

As was implied above, the jury system developed in England. The jury was not used often until the 12th century, but it made its appearance with the Norman invaders. To understand the development of the jury and what it means for America today, it is necessary to understand what was happening to the legal system in England during this time period. With this in mind, it is necessary to

visit England at the time of the Norman Conquest in 1066.

At the time of the Norman Conquest of England, there was no central court which regularly administered law that was common to the whole country.

“English law was, for the most part, administered in many local courts; and the law thus administered was the customary law of the district” (Holdsworth, vol. 1, p. 3). These local courts were very diverse and had different roles and responsibilities to fulfill.

From the last half of the 10th century the country was divided into shires (counties), hundreds, wards, and vills (townships) with each of these categories being smaller in population size than the one previous. The county and the hundred were jurisdictional units that each had its own court. The vills or townships were responsible for various public duties. In particular within the vill was a phenomenon called the tithing which was responsible for producing criminals before the court. These different types of communal (local) courts each had their own peculiarities and jurisdictions (Baker 11).

As was previously mentioned, at the time of the conquest, all of England was divided into shires, or counties. In the 10th century the officials of the shire were the earldorman, the bishop, and the sheriff. The earldorman was the chief official of the shire, but soon they as a class began to diminish in numbers. They

thus used their power and influence to gain control of the provinces. After the Norman Conquest, the “earl” was relegated to a mere title with no real power to rule within the province. Also after the Conquest, the bishop lost a lot of power within the courts due to the severance of the spheres of lay and ecclesiastical jurisdictions. This left the sheriff as the chief official of the shire after the Conquest (Holdsworth vol. 1, p. 10-11).

The sheriff was responsible for enforcement of the king’s fiscal rights and for fulfilling his military police and judicial duties in connection with the shire. The sheriff’s court--the county court--was the governing body of the county. In it administrative, military, and financial business was carried out. “Charters made by private persons were often read before it; and royal command and enactments of the king and Witan were there proclaimed” (Holdsworth, vol. 1, p. 17). The court had general jurisdiction over all kinds of cases: criminal actions, pleas of the crown, lord and tenant disputes, actions for various wrongs, and actions for debt. This court can thus be seen as the most important agent for making and declaring English law before the rise of the central courts.

The hundred court was a smaller division of the county court. This court met more often than the county court and had a special responsibility for finding murderers. The official of the hundred was known as the hundred-reeve and was

usually a bailiff or deputy of the sheriff (shire-reeve). The jurisdiction of the court--like the county court--was general, but with the growth of the frankpledge system, it became more civil and business oriented in nature.

The frankpledge system can be defined as “a system of compulsory collective bail fixed for individuals, not after their arrest for crime, but as a safeguard in anticipation of it” (Holdsworth, vol. 1, p. 13). Within this system, tithings were set up to insure mutual responsibility for the local unit. Throughout England, all persons, unless excused by reason of their rank or the amount of property that they held, had to be enrolled in a tithing group. This group consisted of ten men and was presided over by a tithing man. Notice of a crime was given to a hundred through the county court. The hundred-reeve then reported the crime to his tithing-men. It was then the responsibility of the tithing-men within the hundred to find the criminal. If one of the ten men in a particular tithing committed an offense, it was the duty of the other nine men to present him for trial before the court. If they failed to present the culprit, they would be required to pay for the damage, or crime, that the man had committed as well as pay a fine for not producing the offender. In this way, police duties in the district were placed upon the tithings (Holdsworth vol. 1, p. 14-15).

Although these courts differed from one another and had different

responsibilities, one thing is true: the greatest part of the judicial and administrative work of the government in the Anglo-Saxon period was done in these local courts. The king and his Witan, the assembly of the leading men of the nation, did at times exercise wide legislative, judicial, and executive powers, but it was not until after the Norman Conquest that a strong central authority was developed to rival the local courts.

The communal, local courts have been discussed in detail, but no mention has yet been made of the judges of these courts. The sheriffs and hundred-reeves were not the judges but the administrators, or presidents, of these courts. The judges were men called suitors. As both the county and hundred courts were general jurisdiction, it seems reasonable that either court could be called upon to administer justice in a case. This did not seem to be true.

It was only if a person could not get justice in the hundred court that he sued in the county court; and it was only if a person could not get justice in the county court that he brought his case before the king and Witan. Hence it happened that the greater courts were courts for the greater men, and the smaller courts for the smaller men. The difference between them was in the kind of suitors who attended them, not in the extent of jurisdiction which they exercised (Holdsworth, vol. 1, p. 9).

Though in practice the regular attendants at the county court were the most

important men, in theory it was composed of an extremely varied group of persons.

Attendance at the court was seen as a burdensome duty to many participants. It was similar to the duty of military service to some individuals. The duty of suit came to be attached to landholders and was a real property asset in that suit (or portions of a suit) were sold with the sale of property. As was mentioned, these suitors were the judges of the courts. This was based on the principle that a person should be judged by his peers who were residents in the same locality as the accused. It was also a system of majority rule in the courts--unanimity between the judges was unnecessary. Many legal scholars mark the beginning of English law from the Norman Conquest. The Normans did not impose a whole new body of law upon the English when they took over. In fact, William the Conqueror was anxious to project himself as the legal successor to King Edward the Confessor. Probably the biggest influence that the Norman Conquest had on the English system of law was the introduction of a strong kingship.

The common law of England was produced by centralizing justice, and was the law used by the royal judges throughout the realm. Although the later English kings had ruled the entire country, they had done little to impose a central administration. The Normans brought few new laws to

England, but they brought a stronger view of kingship and a genius for administration (Baker 5).

The development of common law and centralization has been attributed to Henry II rather than William I, but one can wonder whether any of Henry II's accomplishments would have been possible without the Norman influence of a strong central government.

The Crown was seen as the highest law of the land and with it came the responsibility to administer justice. There are obvious limits to what any one person can do, and it seems that the Crown traditionally only reviewed special cases that caught its interest. Common, everyday matters belonged to the county and hundred courts. The Norman influence caused the original jurisdiction of the crown to increase, and subsequent kings increased the control that they had over the central government. Probably one of the biggest innovations that helped to create the central government and common law was the development of the idea of delegation.

The notion that a royal agent, an *iusticiarius*, could transact business and exercise powers of the judicature which belonged to the king's own person, made possible the common law judicial system. The unifying effect brought about by the employment of a nucleus of professional, or at any rate habitual, *iusticiarii*, produced, within two centuries of Norman Conquest, a central system of law (Baker 19).

A couple of reasons have been given for this move towards delegation. The first reason for the development of delegation, politics, is not all that surprising. The power of the sheriff within the shire was immense. The sheriffs were officers of the Crown and had thus been able to wield a lot of power within the community, power that they had often used for their own benefit. The Crown did not want to have to compete with the sheriff for power within the shires. Another reason for the move towards delegation centered upon the idea of the “pleas of the Crown.” These pleas made by the people were matters of particular interest to the Crown, such as public order (Baker 20). Effective criminal justice was a goal of the Crown--especially when revenues could be increased by the imposition of fines for criminal acts. Finally, royal justice may have moved towards delegation in order to better serve the people in the matters of common pleas. People often felt harassed by the local criminal judges yet needed a means of attaining justice in private matters between themselves and local citizens. Royal courts seemed to be the answer to these problems. “Royal justice triumphed not because a conscious effort was made to impose it on the country, but because it was inherently better than the alternatives” (Baker 21).

At first royal justice meant that certain royal officials received permanent appointments as “justiciars of pleas concerning the Crown” (Baker 21) in a county

or group of counties. This plan of locally-based royal justices did not last long, because these justices were susceptible to the same corruptions as the sheriffs. Instead, another way of securing royal justice was needed. Royal justice was secured by sending officials from the royal household out into the counties as traveling justices.

This proved more efficient, because the traveling judges formed a nucleus of *iusticiarii*, who had no local roots, and could be organized under Henry II to tour the whole realm and hear pleas of the Crown (Baker 21).

This idea seems Norman in origin and is reminiscent of the Domesday Inquest (1086) where representatives were sent out to look after the king's interests.

Under Henry II (1154-1189) the judges were sent out on circuits where they heard pleas from local courts. These king's representatives were called "*iusticiae errantes* (wandering justices) or *iusticiarii in itinere* (justices in eyre)" (Baker 22).

In their entirety these justices were a part of the *Curia Regis*. The justices of the *Curia Regis* were a special group from within the king's advisors whom he chose to represent his interests throughout the land and should not be confused with the group of advisors known as the Witan.

The phrase *Curia Regis* is often used to describe the nebulous group of followers which later became the King's Council and (with represent-

atives from shires and burroughs) Parliament. This *Curia* was not merely a judicial court. It was central only in the sense that it followed the king: the center was not static (Baker 22).

The *Curia Regis* in many ways was similar to the Witan--the assembly of the leading men of the nation. The king determined the composition of both groups, and the people who were regular attendants on the *Curia Regis* circuit were the same kind of people who attended the Witan. In fact, the Witan was the central court, composed of the most important men in the nation, that transacted all of the government's business before the Norman Conquest. The *Curia Regis*, as the King's Council after the Conquest, was not a law court at all, but a body of advisors to which the *iusticiarii*, among others, belonged.

Some of these justices traveled with the king and heard cases before him or in his stead. These justices became known as *coram rege*. These justices sometimes heard cases outside the presence of the king, but because they still traveled with him in his court, they were known as *coram rege* (with the king). Another group of the *Curia Regis* justices were known as *in banco* (on the Bench) justices. These justices were still royal justices, but they heard matters in the absence of the king in a fixed place. "The establishment of a stationary royal court, which suitors knew where to find notwithstanding the king's whereabouts,

marks the origin of the traditional judicial system of England” (Baker 23). The idea of a fixed court, or Bench, certainly took root in the time of Henry II and was essential when he and his successor Richard I were absent from England for prolonged periods of time. In this way, only through delegation of power could justice continue to be carried out in the king’s absence. The Bench was not a separate court from the other royal courts nor did it have its own jurisdiction; it was simply the *Curia Regis* justices that convened *in banco* rather than *coram rege*.

In 1209 when King John permanently returned to England from the continent, the Bench was allowed to fade away, and its work was done by the justices of the *coram rege*. This was changed, however, by the Magna Carta 1215, chapter 17 statement. In this chapter, common pleas were declared to no longer follow the king but would be held in a fixed place (which became Westminster Hall). The Bench later became known as the “Common Bench” or “Bench of Common Pleas” because of the statement within the Magna Carta which set the Bench’s jurisdiction as the sole hearer of common pleas.

These itinerant justices and, finally, bench justices would soon become more popular and more powerful than the traditional local courts. In fact, courts of royal justice either eventually took over local courts or simply replaced them.

Common law and king's law were thus in England to stay. It was this common law, and the ability to amass the body of law as it was created in a centralized way, that caused the jury system to develop into the system of today. Without the centralization that the common law and Henry II brought to pass, the jury system as it is known today may never have come into existence.

Along with the strong kingship and centralized government, there was one final important institution that the Normans introduced into English law: the Carlovingian *inquisitio* system. The Carlovingian (Carolingian) kings were Frankish rulers who conquered and ruled Byzantine Italy from A.D.774-887.

These Carlovingian kings, imitating a procedure of the Roman fiscus, assumed the privilege of determining their rights by means of an inquisition (Holdsworth vol. 1, p. 312). This *inquisitio* system required members of a community to supply to the Crown any information that was requested concerning the administration of the government. "Such information might be required either for purposes of a pending litigation, or to supply information upon such matters as the detection of crime or the misconduct of officials" (Holdsworth, vol. 1, p. 312). The Frankish rulers, content with the workings of this new system, implemented the *inquisitio* in areas of present-day Germany and France. The Carlovingian institution survived in the provinces that the Normans conquered and was utilized by the Norman

dukes. These dukes were the ones who introduced the *inquisitio* system to England. It is this institution from which the English jury springs.

Before there were juries as they are known today, there was a system of justice known as proofs. A matter was taken to a court, and the justice would make a decision. After the decision was made for one party or the other, the judge would then ask the “winning” party of the case to give his proof. In this way, the proof was preceded by, and was an attempt to fulfill, the judgment. This proof was shown in one of two ways: by ordeal or by oath. Both of these types of proof were appeals to the supernatural. If the person performed his task adequately, God had rewarded him for his righteousness and he won his case. If he failed in his attempt, he had thus sworn falsely and was exposed to the wrath of God for his sin (Pollock vol. 2, p. 600).

The ordeal involved, or was preceded by, an oath that declared that the man performing the ordeal was innocent of any wrongdoing and should be the victor in the matter at hand. Some of these ordeals included trial by water, trial by iron, and trial by battle. In trial by water the person was thrown into the lake, if the person sank he was innocent and would be pulled out, but many times he died. In the trial by iron, a hot iron was placed in the person’s hand, if a blister developed, the person was guilty. Finally, in the trial by battle, if the person

survived the battle, he was innocent. In the proof by oath, the person had to swear an oath and then present a group of his neighbors as “oath-helpers” to support that his oath was true. There was thus no reason for the court to try to determine if the oath was true; the oath-helpers already had (Pollock vol.2, p. 601).

Along with the concept of proof, the concept of pleadings became important to the development of the jury system. Proofs could not determine the facts surrounding the incident in question. They could only determine a persons guilt or innocence.

The ordeals, trial by battle, and to some extent wager of law, are all examples of the more primitive methods of proof. They could only decide general questions of guilt, or liability, or right, and were quite inappropriate to answer questions of law or to investigate the truth of specific facts (Baker 87).

The object of pleadings was, and still is, to define the question in the dispute between the parties so that it can be tried and settled. As pleadings developed and narrowed disagreements down to single issues, a difference was noticed between matters of fact and matters of law. With this new realization came the knowledge that another method of determining them would have to be developed.

Juries, as they evolved after the Norman Conquest, were commonly referred to as *iurta*, inquest, and assize. One must realize that this jury did not resemble

the present day concept of a jury. It still represented “the country” in its panel. A question was put to the countrymen of the vicinity where a cause of action or crime occurred on the belief that they would know something of the truth. The jurors were sworn to tell the truth drawing from their own knowledge of the crime. This was not done as an oath-helper would have done. The juror did not swear as to the party’s oath, but instead swore that what he was going to report was what he knew or had learned through his own efforts. Though this is a fine line in some respects, it is important to the evolution of the jury system. Despite its inherent superiority over the other methods of proof, this form of jury still had many attributes of the proof. A party could prove his case by enough members of the jury swearing that a matter was true or false based on their own knowledge. The earliest jurors were not expected to come along and try cases by hearing evidence, they were simply to give their versions of the truth, much in the same way as witnesses do today. One difference was that jurors were expected to search out the truth within the community to bring back the correct answer of their findings to the court. It was a long and gradual process that brought about the change from proof by jury to trial by jury (Holdsworth vol. 1, p. 309).

Henry II to date was the monarch who made the most extensive use of the jury in all governmental departments. Under the Assizes of Clarendon and

Northampton, he required juries to “answer as to persons suspected of crimes, as to escheats, as to outlaws, and as to the misdoings of officials” (Holdsworth, vol. 1, p. 312). He sent these orders to all of the *Curia Regis* courts (both *coram rege* and *in banco*) to be implemented there. These juries were thus fulfilling the same roles that the hundreds and tithings traditionally had carried out. These juries also served to help create the system of common law.

One of the most important instruments of the royal power was the inquisition held under the supervision of a royal judge by means of a jury. And wherever royal justice was introduced, this method of determining the facts accompanied it. Thus the jury system spread as rapidly and widely as the justice of the royal courts, and as the rules of common law which those courts were both making and administering (Holdsworth, vol. 1, p. 316).

The system of inquiry by jurors was also used in the local courts for both administrative purposes and judicial purposes. This continued to hold true even after the rise of Parliament in the 14th century caused the central courts to focus mainly on judicial functions. Due to the special civil juries called assizes, this meant that the judicial functions of the central courts became chiefly criminal in nature. These evolving criminal juries helped to eventually create the jury as it is known today.

As was already discussed, the duty of identifying and producing the persons guilty of each crime naturally fell upon the community. Under the Assize of Clarendon 1116 and Assize of Northampton 1176, the community was required to produce the offenders or face punishment (usually fines) themselves. After the discontinuance of ordeals in 1215, and with the severance of ecclesiastical and lay judicial procedures, the jury became the method of trial in criminal cases (Baker 312).

When the royal justices visited a county in their traveling (*coram rege*), the representatives of the town were expected to present suspects before them for judgment. These presentments would then be checked against the official record of crimes which was kept by the coroner, the king's official. Even after the traveling justices ceased to exist and permanent courts were established, the presentment continued to be the mode by which criminals were delivered to be judged. The "grand jury", which was supposed to represent all of the hundreds in the county, maintained its responsibility for the presentments until the eyers ceased. Once this occurred, it became the sheriff's responsibility to call a grand jury of the county together. This body may or may not have represented each of the hundreds in the county, but they would still be persons familiar with the event in question. To this grand jury, the sheriff would pose a question as to whether

enough evidence was in the possession of the grand jury to suspect that the person in question had committed the crime. If enough evidence was believed to be present, the person was held over for trial by the justices; if not, he was released.

The Grand jury scrutinized informations received by them in 'bills of indictment' to decide whether there was sufficient evidence to lay the matter before the justices. If the grand jurors considered that there was a case to answer, they found the bills 'true' by writing *billa vera* on the back; if not, they endorsed the bill 'ignoramus' and proceedings ended. The finding of a true bill by the grand jury was not a judicial proceeding and did not imply guilt, only suspicion. Its effect was to initiate proceedings between the king himself and the accused person on the question of criminal guilt (Baker 276).

These proceedings between the king, or *Curia Regis*, and the accused person caused some problems for the justices after the ordeals were discarded. With the ordeals, the accused could be judged by a physical act that the justice could personally oversee. Without the ordeals, the decision had to be made based on facts and circumstances that had occurred outside the view of the justices. It became necessary to use "the country" in these proceedings as well, and it was from this development that the legal basis for jurors being given the responsibility of finding fact derives.

Justices had the opportunity to develop this fact-finding right for

themselves, but they wanted to be able to continue to concentrate on the issues of law. From this right to find fact, or truth, comes the necessity of unanimity. Afterall, there could only be one truth in a situation. As all jurors were sworn by oath to find the truth, the fear that an “untruth” would be found was gone for God would punish oath-breakers.

Originally a few members of the grand jury, who had presented the indictment of suspicion, were used to testify before the justices as to their findings. By the end of the 13th century, the regularization of this practice had produced the “petty” jury of twelve countrymen which was the only tribunal capable of deciding the guilt of a man accused through the process of indictment. By the end of the 14th century the members of the petty jury had to be different from the members of the grand jury. If a person seated as a petty juror had actually indicted the accused, the accused could have the juror “excepted”, or challenged, from the jury (Baker 331).

There were still no trials being played out before the jury in the 14th century. Jurors were still witnesses in nature and within their group there existed a sense of unity and community. They were regarded by some as fulfilling the old judicial functions of the suitors who were called upon to make judgments in the local courts. Jurors became judges of fact, which they are today, in the course of

medieval and Tudor times as the principles of testimony and verdicts were developed. By the middle of the 16th century, witnesses were summoned to testify before the jury and jurors were no longer supposed to use their private knowledge to decide cases. The Elizabethan judges would even void a judgment where a verdict was given after jurors had spoken privately to witnesses. It was not until the 17th century that the jury completely lost its character as witnesses, although the jury had been exhibiting the character of judge since the 14th century. It was not until the 18th century that an accused could produce his own sworn witnesses (Baker 89).

After being indicted by the grand jury and upon being asked his plea, the accused would plead “not guilty” and would ask to be “put on the country” which was a request for a jury trial. At this time in history, if a person remained silent when asked his plea, it was construed as automatic conviction rather than a compulsory trial. There were great benefits to being tried by a jury: an accused could challenge, or except, up to 35 jurors without any reason and several more for a particular cause, and the final twelve jurors had to convict him unanimously (Holdsworth vol. 1, p. 313).

This unanimous conviction was not as difficult as it would seem. Jurors, after hearing several cases before being given the chance to give a verdict, were

required to remain together until a true verdict was reached. They were also not allowed any food or drink until their decision was made. Also, it was not until 1670 with Bushel's case that jurors were no longer liable to be fined or punished for rendering an acquittal. Bushel's case also gave the jurors the ability to accept or reject witness testimony as true. Finally, the verdict of the jury came to be as inscrutable as a judgment of God and thus could not really be questioned. The only appeal for the convicted in regards to the jury was through *attaint* where a juror could be convicted of perjury for being corrupted. At no time during this development had the decision of fact been appealable. Only judicial, legal error by the judges could be appealed.

The jury as seen here has, through common law, been both static and flexible. As different circumstances arose, the jury system could be accommodated to the situation. Under the rule of precedent and *stare decisis*, bedrock to the common law, the jury did not change much after these initial parameters were created until it came to America.

As the English colonies developed in America, English law developed along with them. The jury system that came to America from England included a grand jury for indictment of a defendant, a twelve-man petty (petit) jury made up of white, property holders drawn from the local community to convict him, the

practice of challenging potential jurors for bias against the accused, verdict unanimity in order to convict, jurors who were finders of both fact and law, and a jury made up of persons with local knowledge. English magistrates carried English law to the colonies with the help of juries made up of colonists. As the colonists became dissatisfied with other aspects of English law, specifically taxation without representation, the break with England was imminent.

Juries made up of colonists were one of the major forces of resistance to the English in the colonies. As American colonists, like John Hancock, were arrested and tried for breaking English law, American juries refused to convict in cases they felt were political in nature, like customs laws, rather than actual crimes. This jury defiance in civilian courts caused Hancock to be brought to trial and to be convicted for smuggling in the British Admiralty court where no local jury was used. In turn, Hancock sued the customs agents in the civil courts for trespass of his ship and was victorious with the local jury. In this way, the local jury was able to show its disdain for English law and resistance to its enforcement (Abramson 9).

One of the largest complaints in the colonies against the Stamp Act of 1765-1766, aside from taxation without representation, was the use of trials in the admiralty courts without juries for those accused of failing to pay these taxes. In

answer to this complaint, English authorities began shipping defendants to England for jury trials there. To the colonists, this was uncalled for behavior. The Declaration of Independence itself placed threats to local juries and local trials on the list of grievances sparking revolution: “For transporting us beyond the Seas to be tried for pretended offenses and for depriving us in many cases, of the benefits of Trial by Jury.”

After the War for Independence and the failure of the Articles of Confederation, the Americans needed a new system of government and governmental charter. As the U. S. Constitution was drafted and sent to the thirteen states for ratification in 1787, a huge debate ensued between the Federalists (supporters of the Constitution) and Anti-Federalists (supporters of state rights) concerning the kind of criminal jury system that the new government would have. Crucial to this debate was whether the local jury of the “vicinage” was impartial and whether impartiality was even necessary to insure justice.

The Federalists and the Anti-Federalists were two groups, which were diametrically opposed to one another, that arose at the time of the creation of the U.S. Constitution. The Federalists were supporters of a strong central government and were the chief authors of the new constitution. The Anti-Federalists were staunch believers in States’ rights and the rights of the people to oppose a strong

government. The Federalists feared a government that was too weak to create a solid nation with some degree of conformity in laws and practices. The Anti-Federalists feared an over-bearing central government that would dictate rules, regulations, and policies to the States, and thus to the people, that would be abhorrent to the local communities. The Anti-Federalists also feared the loss of each particular state's individuality due to conforming to the central government. In the midst of this political debate over the strength of the central government and what rights the States retained, the question of the size of the jurisdiction from which jurors would be drawn in federal cases arose.

The Constitution sent for ratification called for a jury to be created from the State in which the crime had occurred. The Anti-Federalists feared that this would take the matter out of the hands of the local jury which would be familiar with the case. They thought that cases that hinged on "whether the accused was habitually a good or bad man" (Abramson 27) could not be decided by a State-wide jury. Another fear was that a jury drawn from the entire State would not be able to decide cases based on the existing community standards of the vicinage in which the crime occurred. As Abramson states, "jury trials gave local residents, in moments of crisis, the last say on what the law was in their community" (25). One final Anti-Federalist fear was that of a strong overbearing government, and the

jury's ability to control it as it had done in the case of the perceived English tyrants.

The power of the jury to defend against tyranny depended vitally on the principle that a central government would have to leave enforcement of its laws in the hands of the local population--a principle that the Anti-Federalists found sorely lacking in the proposed Constitution of 1787 (Abramson 25).

Federalists feared that a local jury would not be able to judge the evidence sufficiently on its own merit without being in some way biased from other information within the community. The Federalists felt that it was better in this case to be impartial--have no feelings about or prior knowledge about the case--in order to ensure the credibility of justice. The Federalists also argued that "vicinage" had no clear generally recognized definition and that to require the federal juries to be "of the vicinage" would create undue confusion and no national continuity of meaning or practice (Abramson 10).

In the end, a compromise of sorts was reached, with the 6th Amendment to the U.S. Constitution. It reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

— In this way, the Anti-Federalists won by having the jury drawn from a pool smaller than the entire State, and the Federalists won by requiring an impartial jury and by getting to define “district” in later legislation. The Judiciary Act of 1789 created federal courts inferior to the Supreme Court and mapped out judicial districts over which these courts would have jurisdiction. For instance, today there are over ninety federal district courts. The State of Indiana has two, one for the northern half of the state and a second one for the southern half. Let it be remembered, though, that the Constitution set up courts for the federal government; the states were still free to set up their own courts, with their own jury standards within the limits of the constitutional rights of defendants.

Unknown to the Anti-Federalists in this whole mess was the knowledge that common law would serve to defeat what the Federalists could not--the local, knowledgeable jury. The presumption of bias in persons who knew about a case prior to a trial was not new in the 19th century. It was part of the jury's previous evolution from a self-informing body, in England, to a neutral body that listened to witnesses. The Anti-Federalists had found this bias to be a source of local autonomy, and pointed to its use in the American resistance as tantamount to America's current freedom.

— With the beginning of the 19th century, however, bias in jurors was

regarded in a different light. In the 1807 case, *United States v. Burr*, 25 Fed. Cas. 55, Aaron Burr was tried for treason. Aaron Burr was the former Vice-President of the United States under Thomas Jefferson who had forced a vote for the office of President in the House of Representatives when he and Jefferson tied for the number of electoral votes received in the election of 1800. Burr was arrested in 1806 for planning an attempt to seize New Orleans to create an empire in the South separate from the U. S. In *United States v. Burr*, he complained that certain members of the jury who were friends of his enemy, President Thomas Jefferson, should be excused from the jury. The decision on this point sounded the death knell of the local knowledge jury model and outlined the portrait of the impartial juror. Chief Justice John Marshall ruled that if a person had expressed a decisive opinion on an “essential element” of the case, that he should be disqualified from serving as a juror. If his knowledge was great but had not caused him to come to a definitive decision prior to the trial, he was still eligible. Marshall did say that first-hand knowledge was acceptable, but not information that was gained through the newspapers. In this way the problem of pre-trial knowledge thus became the problem of pre-trial publicity.

The fear of pre-trial publicity today has caused many courts to allow

massive amounts of challenging to dismiss knowledgeable persons from the jury. In the United States in the 1980s, estimates are that 3,100 defendants claimed that they could not impanel an impartial jury due to pre-trial publicity (Abramson 45). This is a complete turn-around from the jury of the past in which the very knowledge that qualified persons for jury duty then disqualifies people from serving today.

Today, ideal jury impartiality can only be produced by disqualifying the most well-informed members of the community. This disqualification of individuals concerned with events within their community from jury duty does not tend to inspire confidence in the accuracy of, and responsibility involved in producing, jury verdicts. Chief Justice Marshall in 1807 set American law along the course that it has been following ever since, searching for jurors who are as free as possible from local information, which has come to be called “local prejudice”, and disqualifying those concerned persons who know too much, regardless of whether or not they have reached a conclusion as to guilt or innocence.

Although the Federalists and Anti-Federalists disagreed over the issue of jury geography and the merits of impartiality, one thing they agreed upon was the importance of the jury. One must realize, however, that their concept of the jury

was one in which the jury had the right to decide both questions of fact and questions of law. Throughout the 18th century the prevailing view was that jurors “could ignore judges’ instructions on the law and decide the law by themselves in both civil and criminal cases” (Abramson 30). Juries were afforded this right, because (1) they heard different versions of the law from the judge, the prosecuting attorney, and the defense attorney; and (2) they were the sole defenders of the standards of the local community.

By the end of the 19th century, jurors were presumed to be ignorant of the law and were obligated to abide by the court’s instructions on legal matters.

Although some members of the jury at the beginning of the 19th century would have been familiar with law, most jurors would not have been. The credibility of the early 19th century jurors as finders of law came through their common sense ability to apply laws to the condition of the people of their community through their local knowledge. As local juries and jury bias became points of contention, jurors’ ability to apply the law became questionable as well. In 1895 the Supreme Court in *Sparf and Hansen v. United States*, 156 U.S. 151, decisively rejected the right of criminal juries to judge the law.

The jury entered the 19th century as a body authorized to resolve contested points of law on its own, even to refuse enforcement of laws considered unjust. The jury

exited the century duty-bound to follow judicial instructions and to enforce the law whether it agreed with it or not (Abramson 37).

There is no question about it. Juries are finders of fact and judges are the sole finders of law. What happens to cases when a jury decides to disregard the judge's instruction of law in their finding of fact by finding a person innocent in spite of the law which shows his guilt? This process of overriding the law to find their own verdict is called jury nullification. Jury nullification has long been seen as a means of challenging an unjust law. In a sense, it invites the jury to not punish justified acts of lawbreaking. Martin Luther King, Jr. openly advocated that persons had a "moral responsibility to disobey unjust laws." It seems only fair then that this principle should extend to juries. By overriding unjust laws, the community would be fulfilling a moral right of the individual to act in ways contrary to the law in matters of extreme importance. This form of nullification and overriding the law, however, has been used improperly in the South and other areas to acquit Ku Klux Klan members who murdered African-Americans (Abramson 61). Jury nullification cannot be condoned in such instances. However, criminal juries have the raw power to pardon lawbreaking because there is no device for reversing a jury that insists on acquitting a defendant against the law. A finding of a person guilty against the instructed law can be, and will be,

reversed by the judge. The same *Bushel* case mentioned in the evolution of the English jury is applicable here. In the *Bushel* case of 1670, Chief Justice Sir John Vaughn of the Court of Common Pleas found that jurors could never be fined or imprisoned for their verdicts. In this situation juries could never be punished for acquitting a defendant. This case established the power of the criminal jury to disregard the judge's instructions on law, and barring some sort of future penalty, it gives the jury complete power to determine guilt or innocence.

Another aspect of the criminal jury that has led to difficulties in finding a defendant guilty has been the principle of jury unanimity in their verdict. The first instance of the demand for a unanimous verdict was in England in 1367 when the court refused to accept an 11-1 vote (Abramson 179). There was some use of a majority vote in the American colonies in the 17th century briefly, but these were because of unfamiliarity with common law procedures. It is safe to say that by the 18th century and until 1972 there was no question of there being anything less than complete unanimity in a criminal conviction.

In 1972 the Supreme Court dismissed the unanimous verdict requirement as a "historical accident" lacking any constitutional stature (Abramson 180). The Court concluded that eliminating the standard would not alter the function of the jury to find the defendant guilty beyond a reasonable doubt with a super majority

vote necessary instead of unanimity. Jury verdicts would still represent minority views because deliberations would still take place. At the same time that the court was rejecting unanimity, it said that the number “twelve” for juries was related to history as well and that a smaller number of jurors would not hamper the core functions of the jury. The Court has ruled that six-member juries maintain enough variety to be representative of the community, but it has not recognized the ability to convict on a less than 6-0 vote. As it stands now, States have the ability to determine the size of juries and requirements for jury votes in the question of convictions.

It is somewhat ironic that the Supreme Court ruled out unanimity in verdicts at the same time that it said that juries must be a body that is truly representative of the community. During these changes the Court did rule that potential-juror challenges due solely for matters of race or gender would no longer stand up in court as valid reasons for challenging. If unanimity was still required, the views of the minorities on the jury would be important to the deliberations, debate, and vote in determining guilt or innocence. By dealing the death blow to unanimity, critics claim that the voice of the minority was once again taken away. The majority can simply vote over the objections or concerns of the minority.

In *Apodaca v. Oregon*, 406 U.S. 404, the Supreme Court rejected the

argument that unanimity was essential to enforcement of the 6th Amendment right before a cross-sectional jury. In *Johnson v. Louisiana*, 406 U.S. 369, the Supreme Court rejected the argument that a vote of 9-3 violated the defendant's right to due process under the 14th Amendment to have his guilt proven beyond a reasonable doubt. The Court said that even though some jurors had doubt, a super majority had believed that the defendant was guilty beyond a reasonable doubt and that due process was thus fulfilled. The Court went on to say in *Johnson* that the legislative history of the 6th Amendment originally had "by unanimous verdict" in it but that the Framers rejected it. They reasoned from this that it had never been the intention of the writers of the Constitution to make jury verdicts unanimous.

Although unanimity may not be necessary according to the Supreme Court, there is a much stronger public faith in unanimous verdicts. At a time when the public is dissatisfied with jury acquittals in high-profile cases, the public's confidence in the quality and accuracy of jury verdicts is waning. It appears to the public that juries decide cases according to emotions, prejudice, and sympathy more than according to the law and evidence. It just may be that a non-unanimous verdict is what is needed to restore faith in the jury system and to override the votes of those jurors who refuse to be budged from their illogical positions based on emotion, prejudice, and sympathy. Other people have expressed interest in

once again following England's lead in jury reform by limiting the kinds of cases that civil juries may hear. To be able to limit the jurisdiction of the courts, though, the whole system would have to be changed. This is certainly not likely to happen any time soon, and its overall benefits are questionable.

Even though there are problems with the current jury system, the system still works. It is the background existence of the right to a jury trial, and predictions about how juries would decide cases were they to get them, that drive the parties to settle or plea bargain in the first place. Without the unpredictability of the jury, our system would become a system truly based on law with no room for human reasoning. There would no longer be a barrier between the accused and the accuser or justice against unjust laws.

The American jury system of today still resembles in many ways the English jury from which it sprang. The criminal system still employs the use of a grand jury to indict criminals to hold them over for trial. The American system insures that members of the petit (petty) jury are different than the ones on the grand jury. The American system, like the English one of old, allows for challenging of potential jurors that might be biased against the defendant. The jury in America today is still the only finder of fact, and members swear an oath to fulfill their duty to justice and the standard of beyond a reasonable doubt.

Although the Supreme Court has ruled that twelve-men juries and verdicts of unanimity are no longer necessary, most states still require them in criminal matters.

It is amazing that a system that began with the Norman Conquest of England, which saw juries as witnesses, could give birth to a system that expects almost complete ignorance of the facts surrounding the case. Underlying both systems, though, was the “hands on” ability of the citizen to become involved with the government and justice. In no other situation was the citizen more directly involved in the administration of justice and the government. While other common bonds between the two juries--one of the past and the other of the present--have slipped away, the most important aspect of local input into governing has remained. As long as the civil jury continues to exist, the nation will be able to fulfill its duty, as defined in the Constitution, to protect its citizens from arbitrary law enforcement--something for which a few scruffy colonists once rebelled.

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